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## FOREWORD



Photo: Shannon Kurz

It is once again that time when we take a moment to look back over the year and reflect on where we have been and where we hope to go. As we emerge from the haze of the last two years and take stock of their impact, it has been a joy to return more fully and with due care and consideration to fieldwork and increased in-person activities.

This year we have been especially excited to partner with SWOP at Wits University, PLAAS at the University of the Western Cape, the Legal Resources Centre the Alliance for Rural Democracy in hosting a hybrid conference on tenure security, a first for us at LARC. The conference brought together rural community members, activists, and scholars in conversations about the challenges and complexities of securing rights to land and livelihoods in South Africa and elsewhere. Conference participants from local rural communities could attend the conference in person at venues in Durban, Johannesburg, and East London. The discussions were robust, and the conference has served as an energising springboard for conversations on land tenure security.

The conference was generously supported by: the Ford Foundation, the Claude Leon Foundation, Heinrich Boll Stiftung, the Australian Embassy, the NRF, the DSI, and the Public Affairs Research Institute (PARI).

The work being done on the legal challenge to the Traditional and Khoisan Leadership Act (TKLA) has kicked up a gear this year as the legal team and members of the LARC team work towards the February 2023 hearing date before the Constitutional Court. The preparation for this challenge and the collecting of evidence has been a long and detailed process, and we are optimistic that the outcome will protect the rights of rural communities. We, of course, continue to grapple with the ever-increasing challenges facing the state, which make it difficult to capitalise on important court victories. We have seen this with the Ingonyama Trust judgment. A year after the Court declared that the lease agreements were invalid, communities still wait to be reimbursed for the rental money they paid to the Ingonyama Trust. In the wake of the release of the Phala-Phala report and as we head into the ANC's December elective conference, there is no real hope that

the state will be in a position to abide by this or other judgments. However, we still believe that the precedents set by these cases are a vital tool in the hands of communities and activists.

As the year ends, I would like to extend my sincere thanks to all who make LARC's work possible and meaningful: the LARC team who have continued to show up and give their all. To our Advisory Board, who have helped guide LARC through its inaugural leadership transition. I especially want to mention members who will be stepping down from the Board at the end of the year, Professors Rashida Manjoo and Pierre de Vos; thank you very much. Thank you to all of our partners for the support and continuing relationships. Thank you, too, to our donors who continue to believe in the value of what we do.

We wish you all a safe and restful end to the year.

Warmest Regards,

**Nolundi Luwaya**  
LARC Director

## MEET THE TEAM

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## II HIGHLIGHTS 2021 – 2022

Photo: Shannon Kurz

### LARC WRITING RETREAT

LARC hosted an internal writing retreat between 6 – 8 September 2022 at Chartfield House in Kalk Bay. The thinking behind the writing retreat was for each staff member to come to the retreat with a few ideas of what they will be working on, to prepare in advance about what objectives they want to set for the retreat, and to prepare the required materials. Furthermore, the retreat created a supportive space for quiet and focused writing work. The writing retreat was very successful, with most, if not all, staff members having made substantial progress towards their goals. The team has also carried through the energy from the retreat to continue supporting and motivating each other, so that the work done is not lost, and can be completed soon.

### MONITORING THE IMPLEMENTATION OF THE TKLA

The governance team has been monitoring the implementation of the TKLA by national and provincial government regarding traditional council elections and constitution of Local and Provincial Houses of Traditional Leaders. Traditional councils are to be reconstituted by 31 March 2023 and provinces have begun constituting Houses. It is necessary to monitor these processes to assess whether those are in line with the Act's requirements and constitutional and customary rights. This may lead to a substantive legal challenge against the wording of the TKLA's provisions.

The requirement for elections is linked to the legal validity of traditional councils. Information and updates continue to be shared with partners. A draft concept note for a research project to monitor elections and a monitoring sheet have been developed.

### MAKING FINDINGS OF KEY JUDGMENTS MORE ACCESSIBLE – FIRST STEPS UNDERWAY

LARC housed an intern for several months in early 2022 who began summarising relevant court judgments that hold key decisions and arguments for our three streams. Members of the LARC team reviewed initial summaries produced and the intern has produced another collection of judgments, with a focus on the relevance of the outcomes for rural communities. The next step will be for the remaining summaries to be reviewed, so that they can all be edited, translated and distributed. Our goal is to develop a collection of easy-to-read summaries of judgments, available in multiple South African languages.

Photo: Shannon Kurz



### REVIVAL OF COMMUNAL LAND SECTOR ENERGY AND NETWORKS

The mining team has continued with fieldwork in various provinces to provide support to communities facing threats to their tenure security. These practical case studies have fed into the convenings on communal land tenure to ground our thinking in real struggles faced by rural people.

Fact-finding activities were conducted with the ARD and RSI in Makhasaneni and Matshansundu in KwaZulu-Natal (3 June - 6 June) to investigate the proposed mining by Jindal Iron Ore that will impact communities. The team also visited the Kgatlu community in Limpopo with the LRC (9 - 11 June) to find out more about their history regarding a farm that was bought by 24 people in 1940 but was only registered under 6 people. The idea is to begin a land rights inquiry to update the title deed to reflect that descendants of those 24 people are the owners. On a trip to Mokopane with RSI (15 - 17 July), feedback was given to communities on offers of compensation by mining companies and the formation of a community trust.

The strengthening of these renewed networks and revitalised thinking around communal land tenure are crucial at this time as the introduction of a new Communal Land Tenure Bill in Parliament is imminent.

### CONVENING – TENURE SECURITY (CAPE TOWN), 17 MARCH 2022

LARC and the LRC convened an all-day face to face meeting in Cape Town of legal experts and other relevant stakeholders to identify and develop strategies of addressing tenure security challenges of primarily land-buying syndicates. The meeting discussed the following: a) Best practices for conducting land rights inquiries b) Land-buying syndicates and the conclusion of surface lease agreements c) Exploring possibilities of a section 25(6) legal challenge. This offered the opportunity to bring elements of our mining and land work together.

### ALTERNATIVE MINING INDABA 2022 (AMI2022)

LARC paid the costs (accommodation, food and Cape Town airport transfers) of three community activists from the North West to attend the AMI2022 in Cape Town. The AMI2022 theme was 'A just energy transition for sustainable mining communities in a climate crisis era'.

### LARONA ENGAGEMENTS

LARC attended an education workshop in the North West organised by the ARD and Corruption Watch between 12-14 May 2022. LARC presented on the new guidelines on Mining resettlement and updates regarding our work on community trusts in the platinum belt.



## LAND CONFERENCE 2022

The Failed Promise of Tenure Security. Customary Land Rights and Dispossession

Violence, intimidation, assassinations and dispossession are continuing in parts of the country as black South Africans struggle to defend their land rights against moves by the government, often in cahoots with traditional leaders and private companies. This was the focus of a landmark three-day land conference on *The Failed Promise of Tenure Security: Customary Land Rights and Dispossession*, a hybrid event where about 450 people attended online, and rural residents, leaders and activists gathered at three in-person venues in Gauteng, KwaZulu-Natal and the Eastern Cape. The hybrid conference took place between 17 to 19 August 2022 and was jointly convened by the Land and Accountability Research Centre (LARC) at UCT, the Legal Resources Centre (LRC), the Institute for Poverty, Land and Agrarian Studies (PLAAS) at UWC, the Society, Work and Politics Institute (SWOP) at Wits and the Alliance for Rural Democracy (ARD).

### CONTEXT

Twenty-five years after South Africa's Constitution was adopted the 18 million South Africans living in the former homelands have limited recognition of their tenure security, land and livelihood rights. Instead, their customary and informal land rights are directly and systematically under threat from government laws, policies and practices that abrogate these rights. Inadequate tenure security also impacts on the outcome of the redistribution and restitution programmes as beneficiaries are

often unable to defend the land rights they acquire against predatory elites and find themselves threatened with exclusion.

This Conference sought to inform and enrich the public, academic and political discourse about land tenure rights, ongoing threats to these rights, and the urgent need for legal measures to protect and enhance tenure security in line with the Constitution. It sought to understand the dynamics of past and current contestations over property and authority in the former homelands and on land reform land,

and the vested interests at stake. It interrogated how and why the state has (again) chosen to pursue policies and enact legislation that favours particular elites, including traditional leaders. It sought to engage with, and contribute to strategies and practices concerning community mobilisation, policy initiatives and litigation approaches that protect and enhance tenure security in the former homelands, South African Development Trust Land and on land reform land more generally.

## The conference was structured around the following themes:

- Documenting and exposing the scale, nature and impact of past and current threats to tenure security, and/or contestations over property and authority.
- Examining the place of customary law in the constitutional era and the interface between customary and common law land rights and constructs of ownership in the context of the tenure security promised by section 25(6) of the Constitution.
- Providing and examining past and current evidence of the content and nature of customary land rights to ensure that they are legible and respected within the dominant paradigm of common and statutory law in South Africa or comparative experience of the treatment of customary land rights within dominant legal paradigms in other jurisdictions.
- Examining mobilisation, policy and/or litigation strategies that have attempted to protect customary and other existing rights from past and current threats.
- Discussion of alternative policies, practices and laws that give effect to tenure security both in South Africa and in other jurisdictions – particularly examples from the African continent and the global south.

## The state cannot be trusted

Rural citizens spoke about their experiences while academics presented research and lawyers analysed laws and judgments. There was collective agreement that in view of profound levels of state dysfunction and corruption, bungling and inertia, the government cannot be trusted to enact progressive land laws, let alone implement existing ones.

Since the dawn of democracy, rural citizens have engaged with government processes, policy debates and developing laws – to no avail. Participants observed that, as in colonial and apartheid times, “we cannot fix our problems by talking to the state”. And it seems the government isn’t willing to hold meaningful discussions with communities, as evidenced by its fiasco of a summit on land tenure earlier in 2022.

Rural citizens shared harrowing accounts of how traditional leaders, municipal and national officials participated in land theft – a practice that continues, 28 years into democratic rule. Communal land remains under threat. Yet these struggles are frequently not recognised, even though 18 million people – nearly one in three South Africans – live in these communal areas.

## Violence and intimidation

Grace Maledu – the first applicant in the Maledu judgment which ruled that a mining company granted a mining licence on customary land still requires the consent of the land rights holders – gave an impassioned speech about the importance of land.

“I grew up with a strong belief in the land. We saw our land being

threatened and I stood up to ensure that we do not allow mines to take our land. There was open-cast mining and that jeopardised our land. I have even been arrested because of that,” she said.

Zibuyisile Zulu, from Matshantsundu in KwaZulu-Natal, echoed Maledu’s sentiments, recounting how the India-based Jindal Mine arrived in their village near Melmoth to speak exclusively to the chief, leaving the residents out of its plans to mine there. When they protested, they were intimidated by the police and mine owners. “We have had to move away from home now. We are not sleeping in our homes. The mine sends hitmen to our communities to assassinate us now,” she said. Zulu appealed to lawyers to help them fight this ongoing case.

The government and officials tasked with implementation are not only unable to help people to defend their land rights but often collude with chiefs and companies to dispossess people, the conference heard. Baby Makgeledisa, a land claimant from Putfontein, North West, illustrated this in her presentation: “Those professional classes in government are colonising our land – more than ever before.”

## Women on the frontline

Women at the forefront of struggles to defend family and community land in South Africa’s “communal areas”, gave testimony about the violence and intimidation they face when doing so and when challenging chiefs, companies and government officials. This was the case in Mokopane, Limpopo, where Anglo and other mining companies opted to meet only with traditional leaders, eliminating residents from actively participating in decision-making about issues that directly affect them.

Margaret Molomo, an activist from Mokopane, said defiantly: “I told the chief that many people have passed away [defending their land rights], and I will not ever be scared to live at home and from now on I will be waiting for you to attack me.”

Democracy in the way it is practised in South Africa does not work, rural women stated repeatedly, and the government has turned a blind eye to the struggles of people in rural communities.

In Gwatyu in the Eastern Cape, former farm dwellers who have lived on their land for more than five decades are still victims of repeated violations on the farms they have occupied for generations, while the state would prefer to lease their land to others from under their feet.

## Assassination of activists

A remembrance ceremony formed part of the conference, in honour of land rights defenders who have died, including those who were assassinated after resisting attempts by chiefs and government officials to annex community land. In most cases, their murderers have not been charged, let alone convicted, and rural activists say they live in fear. The violence affects urban as well as rural activists. Just hours after the land conference ended on Friday, yet another land rights defender, Abahlali baseMjondolo community leader Lindokuhle Mnguni, was assassinated at his home at eKhenana in Durban – the third this year in that settlement.

## Denial of property is a colonial legacy

Global experts weighed in, with experience from around Africa, including leading African intellectual, Ugandan Professor Mahmood Mamdani, now professor of government at Columbia University in New York who is listed among the “World’s Top 50 Thinkers”. His seminal book, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, shows South Africa’s experience with indirect rule via chiefs in a comparative light. Mamdani’s address tackled two big issues: how do we define community, and how do we define powers and accountability? All citizens are entitled to rights and cannot be denied them based on identity. Neither can rights to accountable and democratic governance be withheld in the name of custom.

### Communal land

After 27 years since the Constitution was passed, there is still no proper law to define and protect the rights of the people in the former Bantustans or “homelands” – as the Constitution demands. The current draft Communal Land Tenure Bill is unconstitutional, according to advocate Tembeka Ngcukaitobi, speaking on one of the plenary panels at the conference.

This bill, Ngcukaitobi said, shows that the government believes customary land is state land and can be controlled by chiefs through traditional institutions. Yet the Ingonyama Trust judgment last year paid to the notion that communal land is free for the taking and the state can hand it to anyone it chooses. Rural citizens themselves are the owners of the land and should not be conceived as subjects of chiefs or tenants of the trust.

“Instead of transforming existing colonial relations, the risk is that this bill will entrench them. It is a regressive law. The bill further uses a vague notion of ‘community’. This renders the individual and the family invisible,” Ngcukaitobi said. He added that the bill is neither equalising nor transformational, which goes against what the Freedom Charter states, and the Constitution requires.

WE 🗣️ 🗣️  
MUST BE  
EXPLICIT IN  
REJECTING  
THIS BILL!

“We must be explicit in rejecting this bill!”

Ngcukaitobi suggested rewriting the bill from the bottom up, making sure it reflects the views and lived experiences of the affected communities. Conference participants agreed that instead of fighting for amendments to this flawed bill, they would draft an alternative bill themselves. Core to this is for rural citizens to define “custom” rather than accepting rules imposed by the state or chiefs.

### The law does need fixing, though it’s not enough

The government and Parliament can play their part by going back to the High-Level Panel Report of 2017 and the Presidential Advisory Panel Report of 2019. Parliament also needs to expand the law on informal land rights and make it permanent. The Interim Protection of Informal Land Rights Act was passed in 1996 as a holding mechanism for one year. It is only elementary. It needs to be permanent and also strengthened. All this has been pending for many years now.

#### CALL TO ACTION

We call for collaboration across all spheres of society. Lawyers, academics, civil society members and labour movements, academics and researchers must join forces to address the land question. The conference participants called for:

- **Conversations with the Khoi and the San**, as fellow travellers in solidarity, and also affected by the Traditional and Khoi-San Leadership Act as a joint struggle for recognition and land rights;
- **A common platform across civil society and the labour movement** to drive a massive campaign and link rural land struggles to wider campaigns for social justice, urban land and housing, climate justice and social protection;
- **A cadre of pro bono lawyers** who will be allies in defending rights and in strategic litigation. Major law firms are asked to take on customary land tenure matters; and
- **A community of research allies** to document, analyse and disseminate the stories of land tenure practices, governance systems and political struggles.

Finally, participants promised to pursue and engage corporate shareholders, within and beyond South Africa, to target those mining companies, pension funds and other companies that profit from this new era of post-apartheid dispossession of black Africans from the land.



## LAND CONFERENCE IN THE MEDIA

01

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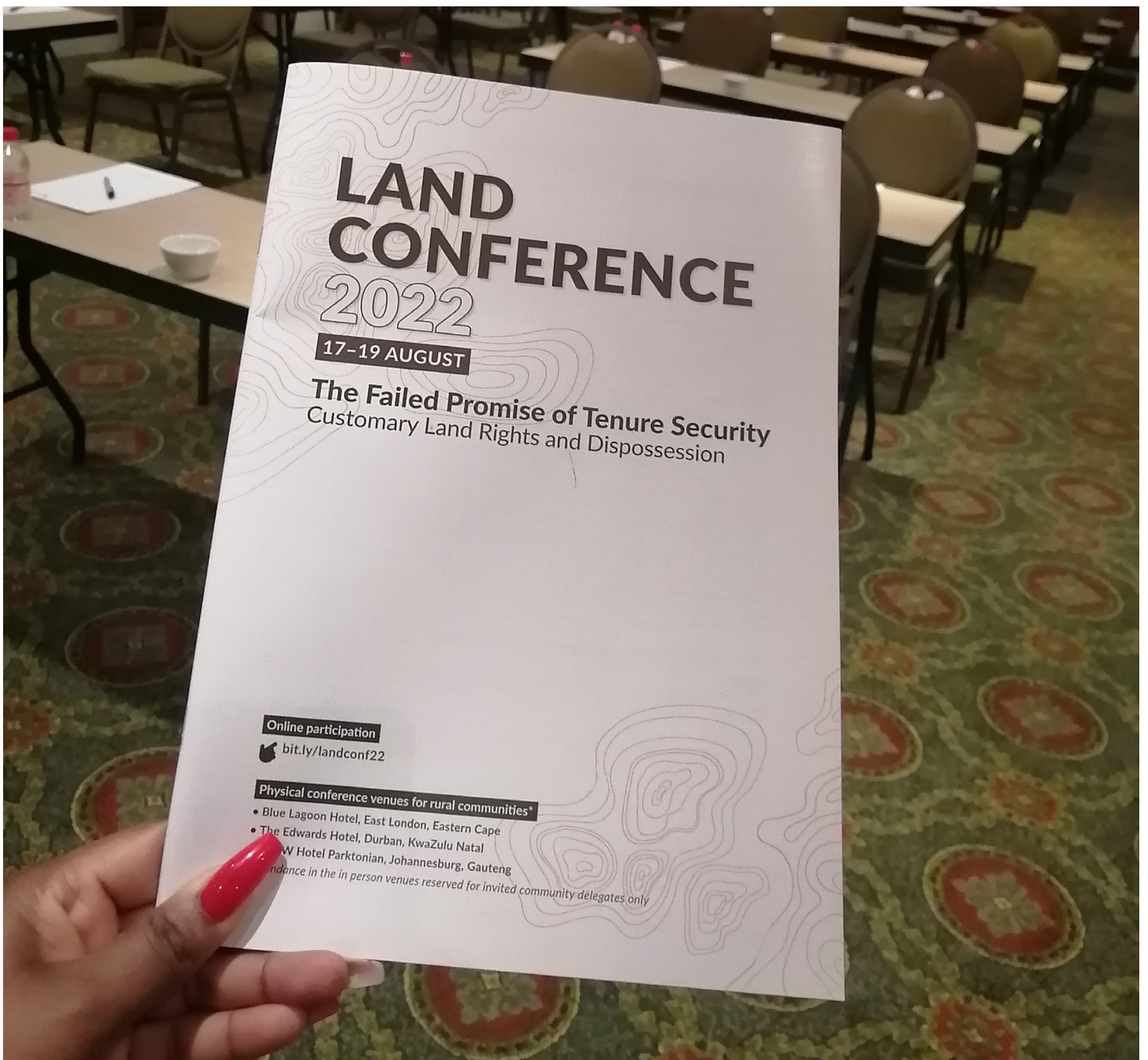




Photo: Shannon Kurz



Photo: Shannon Kurz

## || SHELL CASE

LARC attended the court hearing concerning Shell's intentions to conduct seismic survey operations in the Wild Coast of South Africa set down for 30 May to 01 June 2022. The High Court handed down the judgment on 1 September 2022. The Court reviewed and set aside the decision of the Minister of Mineral Resources and Energy to grant Impact Africa Limited an exploration right (and two subsequent renewals thereof) for the exploration of Petroleum in the Transkei and Algoa exploration areas, and which areas are also known as the "Wild Coast". The High Court held that the consultation process undertaken by Impact was not adequate or meaningful (as statutorily required) and consequently, the decision by the Minister to grant the Exploration Right (and the subsequent renewals thereof) to Impact and Shell amounted to procedurally unfair administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and therefore stood to be reviewed and set aside.

## || GAME-CHANGING JUDGMENTS

The context in which LARC works has drastically changed as a result of key judgments in 2021. The first is the judgment handed down on 11 June 2021 by the Pietermaritzburg High Court. This judgment is a game-changer for communities living on land held under the Ingonyama Trust. It confirmed that it is individuals and communities, and not the Ingonyama Trust or the Ingonyama, who are the "true and ultimate owners" of the land. It clarifies that mining companies must consult and seek the community's consent for unallocated land. For allocated land, they must consult and seek the consent of those who have been allotted the land, not traditional authorities.

The second is the 21 September 2021 handed down by the Pretoria High Court. In its decision, the High Court held that the Mining Charter III is a policy document and not law; and accordingly set aside the provisions of the Mining Charter III which were challenged by the Minerals Council. The judgment affirmed the "Once empowered always empowered" principle advocated by the Mining Council. The 2018 Mining Charter was the first to directly require community shareholding. While it was also meant to apply where ownership was transferred or rights were renewed, these duties were set aside by the Pretoria High Court and not appealed by the Department. There are some clear positives in the 2018 Charter for communities. Community shareholding is now an obligation (for new mining right applicants). The community shareholding is awarded to the community free of charge, eliminating the challenges around financing. However, by setting aside the requirement for community shareholding for renewals and transfer of ownership, communities who were affected by mining and had received little benefits are likely to again be left behind.

## || PASSING OF THE TRADITIONAL COURTS BILL BY PARLIAMENT

8 September 2022

On 8 September 2022, the National Assembly (NA) passed the amended Traditional Courts Bill [B1D-2017] (TCB) in a plenary session. Opposition was expressed by the Democratic Alliance, Economic Freedom Fighters, Freedom Front Plus and African Christian Democratic Party. This version of the Bill, which will now go to President Ramaphosa to sign into law, does not include the opt-out clause that stakeholders fought for since 2008. The provision would allow a party before a traditional court to 'opt out' of its jurisdiction in favour of another forum or court, thereby giving the party the option to choose. Its exclusion is an affront to rural people who have consistently demanded that their constitutional and customary rights be protected. Parliament has refused to do so.

**Book Chapter****Published July 2022****ISBN: 978-1529221145**

Aninka Claassens and Nokwanda Sihlali “Dilemmas and Issues Confronting Socially Engaged Research within Universities”, in Andries Bezuidenhout, Sonwabile Mswana and Karl von Holdt (Eds) *Critical Engagement with Public Sociology: A Perspective from the Global South* (Bristol University Press, 2022)

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## **DILEMMAS AND ISSUES CONFRONTING SOCIALLY ENGAGED RESEARCH WITHIN UNIVERSITIES (ABSTRACT)**

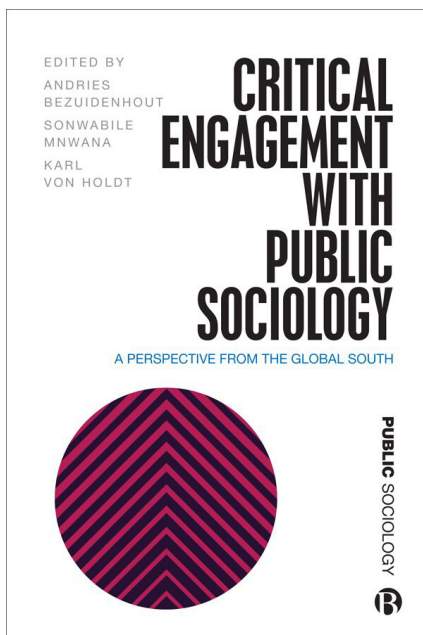
Aninka Claassens and Nokwanda Sihlali



What counts as scholarly knowledge within the higher education sector locally and internationally, and the legitimate process of knowledge production has long been a site of academic contestation. In this paper, we analyse and review emergent themes from our socially responsive work at the Land and Accountability Research Centre (LARC) at the University of Cape Town. We contend that socially engaged scholarship addresses crucial societal issues and throws up cutting edge research questions. It also has the potential to transform some aspects of research and knowledge production.

The University of Cape Town describes social responsiveness as the collection and dissemination of knowledge for public benefit, involving engagement with communities and organisations external to the university. A key feature of socially engaged research is multi-disciplinary collaboration and knowledge co-creation with external partners, in LARC’s case rural community-based organisations.

Investing in such external partnerships is time consuming and requires researchers to produce a range of products to meet the needs of community partners. In this paper we argue that the academy’s focus on peer reviewed academic articles as the gold standard for measuring research output fails to recognise the useful societal outputs, and important analytical innovations that socially engaged scholarship can produce. We situate this in the broader context of resistance to change by those academics who have moulded their careers to comply with ad hominem promotion criteria that re-enforce individualistic outcomes and treat the investment of time and resources in partnerships with external groups as an ‘opportunity cost’ rather than creating new forms of knowledge that add value for the University.



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